IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1305

PEOPLES GAS SYSTEM,
a division of Tampa Electric Company,
Appellant,
v.
POSEN CONSTRUCTION, INC.,
Appellee.

INITIAL BRIEF OF APPELLANT PEOPLES GAS SYSTEM

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 18-13291

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INTRODUCTION

This case is before the Court on a certified question of first impression that asks the Court to determine a party's right to pursue a claim for damages or indemnity under the Florida Underground Facility Damage Prevention and Safety Act. The statute is structured: (i) to create a notification system and procedures that excavating contractors (like Appellee Posen Construction, Inc.) and member operators (like Appellant Peoples Gas System ["PGS"]) must follow to ensure that excavation work proceeds safely; (ii) with the end goal of preventing injury to persons or property and interruption of services; and (iii) when prevention fails, to hold those liable for their violations and the ensuing losses they cause.

Posen violated the statute. Its employee excavated an unmarked area, rupturing PGS's natural gas pipeline, and was severely injured. Posen's employee filed a personal injury action, and PGS seeks to recover the money it paid to settle that matter. The district court dismissed PGS's complaint, and, on appeal, the Eleventh Circuit certified the question to this Court.

The Court's analysis begins and ends with the statute's clear and unambiguous terms, which provide for recovery of "the total sum of the losses" incurred by PGS as a result of Posen's statutory violations. The settlement payment is most certainly a loss to PGS. Based on the statute's express terms, PGS is entitled to recover that loss as either damages or indemnification.

STATEMENT OF THE CASE AND FACTS

I. Overview.

In early 2009, Lee County solicited bids for a road construction project, which included expanding Colonial Boulevard from four to six lanes and installing an underground drainage system alongside and across Colonial (the "Project"). (Doc. 1 at 3-4).[1] Lee County awarded Posen, a heavy construction contractor, the contract to construct the Project. *Id*. at 2, 4.

PGS is a public utility that owns and operates an underground natural gas main (the "main" or "pipeline") that runs parallel to Colonial for the entire length of the Project. *Id.* at 2, 4. The main is a principal artery for delivering natural gas to Southwest Florida. *Id*. at 4. As a result, at the beginning of the Project, PGS declared that the main was a "critical line," and instructed Posen to use caution when working around it. *Id*.

II. The Florida Underground Facility Damage Prevention and Safety Act, Chapter 556, Florida Statutes (2010) (the "Act").

Posen and PGS were subject to the requirements of the Act, which creates a system to provide member operators (*e.g.*, utilities like PGS) with advance notice of excavation activity in areas where such work could impact underground facilities. (Doc. 1 at 2-3). The Act's detailed procedures, which excavators and member operators must follow, help ensure that excavation work proceeds safely.

[1] "Doc." refers to the record in this case, as docketed in the district court.

Id. These include a notification system called "Sunshine One." *Id.* at 5-6. Once an excavator provides notice of a planned excavation through the system, affected utilities can locate and mark their underground facilities, enabling excavators, in turn, to identify and avoid the underground hazards. *Id*. at 7.

PGS marked the main's location with flags and paint throughout the Project. *Id*. at 5. At Posen's request, PGS regularly refreshed the utility marks as the flags were lost or paint eroded. *Id*. PGS also replaced the more permanent locating test stations that Posen destroyed or damaged during the construction. *Id*.[2]

III. The Incident and the Settlement of the Personal Injury Action.

On October 18, 2010, Posen submitted a request to Sunshine One, asking that PGS refresh its utility marks on the Project. (Doc. 1 at 8). But, contrary to the requirements of the Act, Posen did not specifically identify the area to be excavated. *Id*. at 9.

On November 11, 2010, Posen supervisor Greg Menuez directed Mario Santos, one of Posen's heavy equipment operators, to begin excavation – knowing that the pipeline in the area of the excavation was not marked. *Id.* at 9. Posen did not use detection equipment or other acceptable means to locate the pipeline before excavating. *Id*. at 9-10. Santos began excavating at approximately 1:30 p.m. and

[2] Test stations are posts containing wires that physically connect to the pipeline, allowing PGS personnel to accurately find and mark the underground pipeline as the flags and paint were lost and eroded. (Doc. 1 at 5).

at 1:45 p.m. he struck and ruptured the main. *Id*. at 10. Natural gas ignited, and Santos was badly injured in the resulting fire (the "Incident"). *Id*.

Santos sued PGS and Posen to recover damages he sustained as a result of the Incident. *Id*. at 12. Years into the litigation, Santos dropped Posen as a defendant and Posen has maintained that is because of worker's compensation immunity. (Docs. 10 at 8 & 10-2). PGS settled the case at mediation and paid Santos as part of a confidential settlement. (Doc. 1 at 12).[3]

IV. This Lawsuit.

PGS filed the underlying federal action, seeking to recover the settlement payment from Posen. (Doc. 1). PGS' complaint pled two causes of action – a claim for damages under Section 556.106(2)(a) of the Act (Count I) and an alternative claim for statutory indemnity under Section 556.106(2)(b) (Count II). *Id*. at 11-13.

Posen moved to dismiss, arguing that "the settlement amounts at issue are not 'losses' allowed under the Act," and "[t]he Act does not allow for 'indemnity' to a negligent operator." (Doc. 10 at 2). The district court agreed and dismissed the complaint with prejudice. (Doc. 23). *Peoples Gas Sys. v. Posen Constr., Inc.*, 323 F. Supp. 3d 1362 (M.D. Fla. 2018). The court interpreted the Act, which it

[3] PGS gave Posen notice of the mediation, invited Posen to attend, and advised Posen that, if PGS resolved the personal injury action, PGS would seek damages against Posen pursuant to the Act. (Doc. 1 at 12). Posen elected not to attend the mediation. *Id.*

found to be clear and unambiguous, to mean that PGS's damages claims were not allowed by the Act, and "the statute supports no claim for indemnification." *Peoples Gas Sys.*, 323 F. Supp. 3d at 1366-67.

PGS appealed to the Eleventh Circuit, which certified the following question to this Court:

> Whether a member-operator has a cause of action under Fla. Stat. § 5[5]6.106(2)(a)–(c) to recover damages (or obtain indemnification) from an excavator for payments to a third party for personal injuries related to the excavator's alleged violation of the statute?

Peoples Gas Sys. v. Posen Constr., Inc., 931 F.3d 1337, 1342 (11th Cir. 2019).

STANDARD OF REVIEW

The judicial interpretation of the Act is a pure question of law subject to *de novo* review. *E.g.*, *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 253 (Fla. 2006).

SUMMARY OF ARGUMENT

The Legislature has imposed liability on excavators – who, like Posen, violate the Act – for "the total sum of the losses" resulting from an excavation. Even after an excavator obtains the location of an underground facility, the Act requires that the excavator perform an excavation in a careful and prudent manner, and will not excuse an excavator "from liability for any damage or injury resulting from any excavation." That broad language and the relief it affords against excavators serves the primary purpose of the Act – to prevent injury to persons and

property – by holding accountable those who actually can control the excavation work.

To that end, excavators who violate the Act are liable for either damages to member operators or indemnification "to all parties involved." The Act imposes only one limitation and that is to the *amount* that may be recovered for certain categories of damages: "Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility." Otherwise, the Legislature did not include any limitation on the types of damages that a member operator, like PGS, may recover from an excavator; nor does the Act impose any other limitation on an excavator's exposure in the context of indemnification.

Posen is responsible for the excavation accident that led the parties here. It violated the Act when it had its employee excavate an area that it knew was not marked and it did so without taking precautions. That violation had consequences: Posen's employee was badly injured, sued, and PGS paid to settle the claim. The settlement payment was a loss to PGS, and it was a loss that PGS incurred because of the injury that Posen caused. There is no basis to conclude that the Act excludes the settlement payment from "the total sum of the losses" resulting from the excavation. Under the Act's clear and unambiguous terms, PGS is entitled to recover its losses from Posen.

ARGUMENT

As a member-operator, PGS has a cause of action under Section 556.106(2)(a)–(c) to recover damages or obtain indemnification from Posen for the payment PGS made to settle Santos' personal injury claims as a direct result of Posen's violations of the Act.

A. The law on statutory interpretation.

To determine Posen's liability under the Act, the Court's analysis begins with the Act's text and its plain meaning. *E.g.*, *Johnson v. State*, 78 So. 3d 1305, 1310 (Fla. 2012); *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009).

> The Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reason against it. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.

Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992) (citations omitted); *see Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) ("courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or *limit* its express terms or its *reasonable and obvious implications*"; doing so would be "an abrogation of legislative power") (original emphasis by the court).

Thus, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly*, 450 So. 2d at 219 (citation omitted); *see State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973) (rules relating to the construction of statutes are "useful only in the case of doubt and should never be used to create doubt, only to remove it."). In those situations, "the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what judges might think that the legislators intended or should have intended." *Forsythe*, 604 So. 2d at 456 (citation omitted). As this Court has explained, "there is a difference between ambiguity and unexpressed intention." *Forsythe*, 604 So. 2d at 455. "[T]he fact that the legislature may not have anticipated a particular situation does not make the statute ambiguous." *Id.* at 456; *see also Nettles v. State*, 850 So. 2d 487, 495 (Fla. 2003) ("the fact that appellate courts may differ with regard to the application of statutory provisions does not necessarily render a statute ambiguous") (citation omitted).

B. The statutory text.

The stated intent of the Act is to "provide access for excavating contractors and the public to provide notification to the system of their intent to engage in excavation or demolition." Fla. Stat. § 556.101(2) (2010). The practical effect of

that system and the primary purpose of the Act are to "[a]id the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation … operations." Fla. Stat. § 556.101(3)(a) (2010). The Act has detailed procedures in place to carry out that purpose. *E.g.*, Fla. Stat. §§ 556.105 & 556.114 (2010). And if that fails, as it did here, the Act assigns liability when the statutory procedures are not followed and losses occur. Fla. Stat. § 556.106 (2010).

> An excavator's liability under the Act is addressed in three parts:
>
> (a) If a person violates s. 556.105(1) or (6), and subsequently … performs an excavation … that damages an underground facility of a member operator, it is rebuttably presumed that the person was negligent. The person, if found liable, is liable for *the total sum of the losses* to all member operators involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility …
>
> (b) If any excavator fails to discharge a duty imposed by this chapter, the excavator, if found liable, is liable for *the total sum of the losses* to all parties involved as those costs are normally computed. Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility …
>
> (c) Obtaining information as to the location of an underground facility from the member operator as required by this chapter does not excuse any excavator from performing an excavation ... in a careful and prudent manner, based on accepted engineering and construction practices, and it does not excuse the excavator from *liability for any damage or injury* resulting from any excavation …

Fla. Stat. § 556.106(2)(a)-(c) (2010) (emphasis added). The Act's plain language makes an excavator liable for *the total sum of the losses* that result when the excavator violates the Act and its duty to excavate in a careful and prudent manner.

Subsections (a) and (b) afford distinct claims against excavators. Section 556.106(2)(a) provides only member operators with a claim for damages "**for the total sum of the losses to all member operators involved as those costs are normally computed"**; and a presumption of negligence in those cases where a "person" performs an excavation and damages an underground facility as a result of the person's failure to comply with two provisions of the Act (dealing primarily with advance notice of excavation activity).

Section 556.106(2)(b) authorizes a separate claim for statutory indemnity against excavators: if an excavator fails to discharge a duty imposed by Chapter 556, its liability extends to "**the total sum of the losses to all parties involved as those costs are normally computed."** This is true even where the member operator or "party" bringing the claim is also negligent.

Section 556.106(2)(c) makes it clear that, even when an excavator obtains location information required by the Act, it remains accountable to perform an excavation "in a careful and prudent manner, based on accepted engineering and construction practices, and it does not excuse the excavator from **liability for any damage or injury resulting from any excavation**." That is consistent with the

Act's primary purpose to prevent injury and damage. Because an excavator can control the course and scope of its excavation work, it is in the best position to prevent accidents leading to injury or damage.

C. Posen's liability for damages under Section 556.106(2)(a).

The issue is not whether Section 556.106(2)(a) authorizes a claim against a negligent excavator – it does.[4] The question is whether the damages PGS seeks (the settlement amount paid by PGS to Santos) are recoverable. Based on the plain and unambiguous terms of Section 556.106(2)(a), the answer is yes.

The damages available to a utility are broad. The Act entitles PGS to recover the "total sum of the losses" arising from Posen's violation of the statute. It does not limit the *type* of damages a member operator may recover. And specifically, the Act does not include a definition limiting "losses."[5] Instead, the

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[4] Claims for damages under section 556.106(2)(a) have been recognized by state and federal courts. *See Southland Constr., Inc. v. Greater Orlando Aviation*, 860 So. 2d 1031, 1037 (Fla. 5th DCA 2003); *A & L Underground, Inc. v. City of Port Richey*, 732 So. 2d 480, 480-81 (Fla. 2d DCA 1999); *James D. Hinson Electrical Contracting Co., Inc. v. BellSouth Telecomm., Inc.*, 642 F. Supp. 2d 1318 (M.D. Fla. 2009); *MCI Telecomm. Corp. v. Main Line Plumbing, Inc.*, No. 96-293-CIV-HOEVELER, 1998 WL 34256251 (S.D. Fla. Jan. 13, 1998). The claims have been recognized by various labels. *See A & L Underground*, 732 So. 2d at 481 (suit for "violations of the Act"); *MCI Telecommunications Corp.*, 1998 WL 34256251 at *6 (claim for "negligence" based on the Act).

[5] *See A & L Underground*, 732 So. 2d at 481 (in addition to allowing recovery for damages for personal injury or property damage, "the clear language of section 556.106(3) [relating to a member operator's liability to an excavator] … allows recovery for purely economic losses," *i.e.*, the Act allows for recovery of "the total cost of any loss").

Act limits the *amount* recoverable for certain categories of damages (*i.e.*, loss of revenue and loss of use): "Any damage for loss of revenue and loss of use may not exceed $500,000 per affected underground facility…." Fla. Stat. § 556.106(2)(a) and (b) (2010). This is important because it demonstrates that the Florida Legislature knows how to place limitations on "losses" or damages recoverable, but it chose to only limit recoveries for loss of revenue or use. *See Cason v. Florida Dept. of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) ("In the past, we have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question.").

The Legislature chose not to include any other limitation on an excavator's exposure. To the contrary, in Section 556.106(2)(c), the Act reinforces the scope of an excavator's liability, which extends to a broad range of damages and injuries: "Obtaining information as to the location of an underground facility from the member operator … does not excuse the excavator from liability *for any damage or injury resulting from any excavation* …." (emphasis added).

In short, there is nothing in the Act that would exclude the payment that PGS made to settle Santos's personal injury claim – which arose from Posen's violation of the Act – from "the total sum of the losses to all member operators involved as those costs are normally computed." Fla. Stat. § 556.106(2)(a) (2010). To

conclude otherwise would limit the statute's express terms, which the Court cannot do. *See, e.g., Holly*, 450 So. 2d at 219 ("courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications"). And contrary to the Eleventh Circuit's characterization, the settlement payment is not a remote loss. *Peoples Gas Sys.*, 931 F.3d at 1339-41. This accident happened *because of* Posen. It violated the Act and ordered Santos to excavate an unmarked area without taking precautions. Posen's decisions led to the injury and damage that the Act seeks to prevent. And yet PGS, not Posen, paid for it. That payment was a loss to PGS, which it incurred because of the injury that Posen caused.

D. Posen's liability for indemnification under Section 556.106(2)(b).

An obligation to indemnify may arise out of a liability imposed by law. *See, e.g., Stuart v. Hertz Corp.*, 351 So. 2d 703, 705 (Fla. 1977); *Mims Crane Serv., Inc. v. Insley Mfg. Corp.*, 226 So. 2d 836, 839 (Fla. 2d DCA 1969). That is what the Legislature did here. The Act expressly creates an obligation to indemnify by requiring an excavator who has failed to comply with the Act to bear the "total sum of the losses to all parties involved." Fla. Stat. § 556.106(2)(b) (2010).

The Act does not expressly use the term "indemnify" or "indemnity" and it does not need to. Florida law does not require a statute to use the word "indemnify" to create an indemnification obligation. For example, Section

30.2905, Florida Statutes, has been held to create an indemnification obligation even though the statute does not use the word "indemnify." The statute states that any "public or private employer of a deputy sheriff shall be responsible for the acts or omissions of the deputy sheriff while performing services for that employer while off duty …" Fla. Stat. § 30.2905(2)(a) (2011).

That statute was addressed in *Martinez v. Miami-Dade County*, 975 F. Supp. 2d 1293 (S.D. Fla. 2013), where a Blue Martini patron was injured by off-duty Miami-Dade police officers. *Id*. at 1295. The patron sued, and the county cross claimed against Blue Martini seeking indemnification based on Section 30.2905. *Id*. at 1296. Blue Martini moved to dismiss, arguing that the statute did not expressly provide for indemnification. *Id*. at 1297. The court rejected the argument, noting that Blue Martini was unable to offer "an alternative meaning to the phrase 'shall be responsible for the acts or omissions.'" *Id*. *Martinez* properly recognizes that when a statute assigns liability, a right to indemnification must exist in favor of other parties who face liability. If not, the statute will not achieve its purpose.

Here, an excavator who violates the Act "is liable for the total sum of the losses to all parties involved as those costs are normally computed." Fla. Stat. § 556.106(2)(b) (2010). That language is at least as broad as the language used in Section 30.2905, which states that an employer "shall be responsible for the acts or

omissions of the deputy sheriff." Fla. Stat. § 30.2905(2)(a) (2011).[6] Further, and as discussed above, the Act places no limitation on the "losses" a member operator may seek. Instead, the Act shifts liability for "losses" incurred by a member operator to an excavator that violates the Act. Based on the Act's plain terms, PGS's settlement payment to Santos, necessitated by Posen's violation of the Act, constitutes a loss for which PGS is entitled to indemnity under the Act. There is no reasonable alternative interpretation for the statute.

Moreover, a statutory claim for indemnity may exist regardless of whether a claim for common law indemnity is or can be pleaded. That was the situation in *Wendt v. La Costa Beach Resort Condominium Association, Inc.*, 64 So. 3d 1228 (Fla. 2011), where corporate directors for a condominium association sought

[6] The Eleventh Circuit drew a distinction between the statute in *Martinez* and the Act because, contrary to the district court's finding, it considered the Act "clearly ambiguous with multiple reasonable interpretations" – that is, according to the Eleventh Circuit, "'[l]osses' may or may not include relatively remote indemnity payments to third parties in separate litigation proceedings." *Peoples Gas Sys.*, 931 F.3d at 1341. As discussed above in Point C, the record does not bear that out. The settlement payment is directly attributable to Posen's statutory violations; the injury that Posen caused and that necessitated the settlement payment is precisely what the Act seeks to prevent. The Eleventh Circuit's position seems to be based on a concern over the broad relief afforded by the Act. But that was the Legislature's choice, to afford broad relief, as evidenced by the plain language of its enactment. *See, e.g.*, *Forsythe*, 604 So. 2d at 455-56 ("there is a difference between ambiguity and unexpressed intention" and "the fact that the legislature may not have anticipated a particular situation does not make the statute ambiguous"; indeed, "[e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.") (citation omitted).

indemnification pursuant to Section 607.0850, Florida Statutes. *Id*. at 1231.[7] The majority held that the directors could seek statutory indemnity, even though they did not make the allegations required for common law indemnification. *Wendt*, 64 So. 3d at 1231. *Martinez*, 975 F. Supp. 2d at 1297, held the same.[8]

Because the Act is clear and unambiguous, there is no need to turn to statutory construction aids. But, to the extent the Court finds it helpful, other states have found indemnification obligations created by similar statutes, even where legislatures did not use the word "indemnify."[9] For example, in *Gunnell v. Arizona Public Service Company*, 202 Ariz. 388, 46 P.3d 399 (Ariz. 2002), the Arizona

[7] Section 607.0850 expressly provides directors the right to indemnity in certain circumstances.

[8] Other states also recognize that statutory indemnity claims have different elements than common law indemnity claims and can be pursued even in the absence of a claim for common-law indemnity. *See, e.g., Orange Cty. Water Dist. v. Alcoa Glob. Fasteners, Inc.*, 12 Cal. App. 5th 252, 300-04, 219 Cal. Rptr. 3d 474, 516 (Cal. Ct. App. 2017), *as modified on denial of reh'g* (June 22, 2017) (rejecting defendant's argument that the plaintiff was limited to an action for traditional indemnity and recognizing a cause of action for statutory indemnity); *Bridgestone/Firestone N. Am. Tire, L.L.C. v. A.P.S. Rent-A-Car & Leasing, Inc.*, 207 Ariz. 502, 88 P.3d 572, 584 (Ariz. Ct. App. 2004) ("[W]e agree with A.P.S. that § 12–684(A) 'merely provides a statutory indemnity claim separate and apart from common law indemnity.'"); *United Med. Supply Co., Inc. v. Ansell Healthcare Prod., Inc.*, 476 S.W.3d 84, 88 (Tex. App. 2015) ("Unlike indemnity under the common law, statutory indemnity does not require a finding that the manufacturer was liable or that its particular product actually caused the plaintiff's injury.") (citation omitted).

[9] Some states use the word "indemnify" in statutes designed to protect underground facilities. *See, e.g.*, Tenn. Code Ann. § 65-31-112(e)(3)(A) (West 2015); 12 V.I.C. § 699b(b) (2016); Colo. Rev. Stat. Ann. § 9-1.5-104.5(2)(d)(II) (West 2018); Wyo. Stat. Ann. § 37-12-306(h)(iv)(B) (West 2019).

Supreme Court held that the Arizona Underground Facilities Act, Arizona Rev. Stat. § 40-360.21, *et seq*. ("Arizona Act"), "requires the violating excavator to indemnify a violating owner for damages to a third party." *Id*. at 404. The Arizona statute provided:[10]

> If a violation of this article results in physical contact with an underground facility, the violator is liable to the owner of the facility for all damages to the facilities and costs, expenses and damages to third parties incurred by the owner of the facility as a result of the contact.

Arizona Rev. Stat. § 40-360.28(B) (1999).

Arizona also has law protecting high voltage overhead power lines that does not use the word "indemnity," but still has been interpreted to provide indemnification to the utility company operating the lines ("Arizona HVA"). Arizona Rev. Stat. § 40-360.44. Section 40-360.44(B) of the Arizona HVA states:

> If a violation of this article results in physical or electrical contact with any high voltage overhead line, the person or business entity violating this article is liable to the public utility operating the high voltage overhead line for all damages to the facilities and all costs and expenses, including damages to third persons, incurred by the public utility as a result of the contact.

In *Tucson Electric Power Company v. Swengel-Robbins Construction Company*, 153 Ariz. 486, 737 P.2d 1385 (Ariz. Ct. App. 1987), the court applied the Arizona HVA to a wrongful death case where a crane contacted a high voltage power line. The surviving spouse of the deceased employee sued Tucson Electric

[10] The Arizona Act has since been amended.

Power Co. ("TEP") and the crane manufacturer. *Id*. at 1386. TEP filed a third-party complaint against the construction company, Swengel, seeking indemnity based on the Arizona HVA, and was granted summary judgment on that claim. *Id*. On appeal, Swengel argued that the Arizona HVA was unconstitutionally vague and fundamentally unfair to the extent it may be required to indemnify TEP for TEP's own negligence. *Id.* at 1387. In rejecting that argument, the court explained the public policy reasons for permitting indemnification for utility providers:

> **The statute represents a determination by the legislature that where work is being performed near power lines, the person or entity performing the work is in the best position to prevent injury—whether caused by its negligence or that of the utility—by giving notice so that appropriate protective measures may be taken.** The imposition of liability for what is in effect Swengel-Robbins' own negligence in failing to give notice and thereby enabling TEP to take action to prevent injury is a reasonable legislative choice, and we find no constitutional violation.

Id. at 1387 (emphasis added).

Idaho, like Arizona, also has a High Voltage Act ("Idaho HVA"), Idaho Code Ann. § 55-2401, *et seq*., which states:

> If a violation of the provisions of this chapter results in physical or electrical contact with any high voltage overhead line, the contractor committing the violation shall be liable to the public utility owning or operating the high voltage overhead line for all damages to the facilities and all costs and expenses, including damages to third persons, incurred by the public utility as a result of the contact.

Idaho Code Ann. § 55-2404 (1992). In *Kootenai Electric Cooperative, Inc. v. Lamar Corporation*, No. CV-02-08891, 2003 WL 23914538 (Idaho Dist. Oct. 23,

2003), the court held that defendant Lamar was required to indemnify the utility company under the Idaho HVA for injuries suffered by Lamar's contractor, even though the jury found significant negligence by the utility company. *Id*. at *9.

In each case cited above, the courts determined that the substantially similar statutes shifted liability from the utility to a third party when the third party failed to comply with laws designed to ensure safety around the utility's facilities. Notably, no statute uses the word "indemnify" or "indemnity," yet each court held that a statutory indemnification obligation existed. And while each cited statute specifically refers to damages to "third parties" or "third persons," Section 556.106(2)(b)'s language is even broader. It makes an excavator in Florida responsible for the "*losses to all parties involved*." Fla. Stat. § 556.106(2)(b) (2010) (emphasis added). Indisputably, "all parties" is broader than, and must include, "third parties" like Santos.

Moreover, the right to indemnification arises even if the utility is also negligent. *See Tucson Elec. Power Co.*, 737 P.2d at 1387; *Kootenai Elec. Co-op., Inc.*, 2003 WL 23914538, *7-9. The same is true under the Act. Section 556.106(2) does not absolve an excavator from responsibility simply because the member operator was also negligent. An excavator is only discharged where it fully complies with the statute.

This interpretation is supported by Section 556.106(3), which defines an excavator's claim against a member operator that violates the Act.[11] An excavator's cause of action accrues *only* if the excavator has provided proper notice of its excavation work and has fully complied with the Act. Fla. Stat. § 556.106(3) (2010). That is, it is only where the excavator is *not* liable and has fully complied with its statutory obligations, that a member operator who violates the Act can be responsible for the excavator's losses. Otherwise, the excavator is responsible for the total (100%) sum of the losses to all parties. Based on the plain terms of the Act, an excavator who, like Posen, violates the Act and engages in unsafe excavation practices carries the burden of the losses incurred by "all parties involved."

[11] Section 556.106(3) provides:

> If, after receiving proper notice, a member operator fails to discharge a duty imposed by this act and an underground facility of a member operator is damaged by an excavator who has complied with this act, as a proximate result of the member operator's failure to discharge such duty, the excavator is not liable for such damage and the member operator, if found liable, is liable to such person for the total cost of any loss or injury to any person or damage to equipment resulting from the member operator's failure to comply with this act. Any damage for loss of revenue and loss of use shall not exceed $500,000 per affected underground facility, except that revenues lost by a governmental member operator, which revenues are used to support payments on principal and interest on bonds, shall not be limited.

Fla. Stat. § 556.106(3) (2010).

CONCLUSION

Based on the plain and unambiguous terms of the Act, Appellant PGS has a cause of action to recover its losses as either damages or indemnification. PGS respectfully requests the Court to answer the certified question in the affirmative, thereby allowing PGS to proceed with its action against Posen under the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 3, 2019, I e-filed this Initial Brief with the Clerk of the Court by using the Florida Courts E-Filing Portal, which will send an electronic copy of the brief to counsel listed below.

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I certify that this Initial Brief was prepared in Times New Roman, 14-point font, in compliance with the requirements of Florida Rule of Appellate Procedure 9.210.

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